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Charles F. Southmayd

1824-1911

by

Joseph H. Choate

With Mr. Choate's Compliments.



Yours very truly
Chas. F. Thompson.

MEMORIAL OF
CHARLES F. SOUTHMAYD

READ BY JOSEPH H. CHOATE
BEFORE THE BAR ASSOCIATION OF
THE CITY OF NEW YORK

NEW YORK
MAY FOURTEENTH
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CHARLES F. SOUTHMAYD

A Memorial

CHARLES F. SOUTHMAYD was born in the City of New York on the twenty-seventh day of November, 1824, and died in the same city on the eleventh day of July, 1911, thus spanning the arch of time from the administration of the fifth President of the United States to that of the twenty-sixth, and his death severed one of the very few surviving links between our own busy age and that era of good feeling which closed the first quarter of the nineteenth century.

As he was one of the great lawyers of his time and commanded the unbounded

confidence and esteem of all the leaders of the profession, we may well pause for a few minutes to contemplate his career and to consider the great changes which it had witnessed, although to the man of to-day he was only a name and hardly that. But some of us can remember when he was the leading figure in everything that involved sound learning and technical skill in the law. He came of good old New England stock, the first emigrants of the name having landed at Salem, and I find men of his name, which is an unusual one, graduating at Harvard and Yale in the seventeenth and eighteenth centuries, with whom he was doubtless connected. Through his mother he was proud to trace a near connection with the Gouverneurs, the Ogdens, the Kembles, and the Kearneys, although he was the last man ever to speak of such things. He was baptized in St. John's Chapel,

which was very near his father's residence on Laight Street near Varick, Nicholas G. Ogden and Edward F. Hammeken being his godfathers, and he always claimed that thereby he had become incorporated into the Church and was entitled to good standing therein for the rest of his life. His school days, which were spent at a private school, seem not to have been much longer than Benjamin Franklin's in Boston, for, at the unripe age of twelve and a half, his teacher announced to his astonished father that he had taught the boy all that he knew and he had thoroughly mastered it, and what to do with him then was the question. Happily, Providence was on the lookout for him. Elisha P. Hurlbut, who afterward became a Judge of the Supreme Court, had a friend who informed him about Charles and of his parents' dilemma, and he asked to see the

boy and looked him over and doubtless examined him to find out what he already knew. Being a phrenologist and phrenology being all the rage at that time, Mr. Hurlbut declared that there was the making of a lawyer inside that head. So he invited his parents to send the boy to him and he would try to make a lawyer of him. Judge Hurlbut was then practicing law in copartnership with Edward H. Owen at 63 1/2 Cedar Street, and about a year afterward he formed a new partnership with Alexander S. Johnson, who, in subsequent years, became a Judge of the Court of Appeals and successor to Ward Hunt as Circuit Judge of the United States for the Second Judicial Circuit, under the firm name of Hurlbut & Johnson at 73 Cedar Street.

With two such men of distinction, skilled in the law and interested in public affairs, both of them, as the event

showed, looking forward to judicial life, the boy found his chance and speedily made the most of it. Although he thus actually began the study of the law at a very tender age, he found it most congenial and buckled down to it in earnest. He seems to have had no tuition, outside the office at any rate, except what he may have got by attending Court; but he had wonderful powers of concentration and made such progress and so rapidly mastered the law that, at seventeen, he came to be known in the office as the "Chancellor"; and the story goes that when clients called they were apt to find the two masters in the outer office discussing public questions, and they would say: "Do you want to talk politics? Here we are. But if you've come on law business you will find the Chancellor inside."

In truth, without his knowing it, his

legal studies had been conducted on the most approved modern method, the case system. Great praise has justly been accorded to Professor Langdell, who organized and coördinated that method of study in the Harvard Law School, but, in truth, it was the same old method on which Southmayd and Charles O'Connor and Professor Langdell himself had been spontaneously trained—or, rather, had trained themselves: the study and complete mastery of the individual case, as the original source and record of the legal principle involved.

I would by no means disparage or depreciate the generally acknowledged superiority of the legal education now given by the best law schools of the country to aspirants for admission to the Bar, but no one can doubt that the case system, as pursued by Mr. Southmayd and his predecessors prior to the establish-

ment of law schools, in which, by their own unassisted efforts and study, or with the aid of experienced lawyers whose offices they entered, they sought for and found the original sources of the principles of law in cases actually decided and which they fully mastered, was the best method yet achieved.

Certainly such training was superior to that which prevailed at the Harvard Law School at, and for some time after, the time when Mr. Southmayd was thus making himself a triumphant master of the law.

At that time, no examinations whatever were required to get in, or to get on, or to get out of the Dane Law School, as it was then called. We lingered for the appointed time upon the hard benches of Dane Hall listening, or not listening, daily, for two hours, to lectures more or less inspiring, or more or less

benumbing, and received, by lapse of time, at the end of two years of more or less faithful pursuit of this method of training, our degree of LL.B. as a matter of course, and yet, at the same time, there was a growing habit of study, even under that loose system, which resulted in the production of many learned and useful lawyers.

But I doubt whether many of the recipients of that degree, prior to the regular establishment of the Langdell system, could have equaled Mr. Southmayd in his accurate and precise knowledge of the principles of law, as theretofore established by the courts of New York and the Supreme Court of the United States. He could have told you, with absolute correctness, of the law, for instance, established by the almost unanimous voices of the judges of the various courts of New York, who held that it was within

the power of the State to grant an exclusive right to navigate within its own waters by vessels propelled by steam, which would have had the effect to limit the commerce of the port of New York to the vessels of Livingston and Fulton, or their assignees,—an almost inconceivable thing, in view of the marvelous development of the power of Congress to regulate commerce as now established.

And he could have told you, with equal accuracy, of every step by which that whole line of decisions was overthrown, at a single blow, by the masterly process of reasoning applied to them by Chief Justice Marshall.

And so he could have told you the whole history of the Dartmouth College case, and how the same great genius vindicated the power of the nation as against laws of states which undertook, in any form, to impair the obligation of con-

tracts in defiance of the provisions of the federal constitution.

It was by the study of such cases, before the questions involved in them were overwhelmed by the infinite number of decisions in which they are now buried, that he acquired the wonderfully clear and forceful way in which he always handled constitutional questions, as illustrated, for instance, in the Income Tax case.

And in the practice of the law, beginning, as he did, before the introduction of the pernicious Code of Procedure, which has done so much to spoil the practice in this State, he was able to steer his course, in the consideration and decision of questions submitted to him, on grounds of pure principle, without distortion by technical points and considerations.

I consider that this Association and

the Association of the Bar of the State of New York could do no better service to the profession than to see what can be done to protect it from the crushing weight of the ever-growing mass of judicial decisions and the ever-growing bulk of the New York Code of Procedure.

It is impossible for the profession here to make much further advance in the future, unless it shall be relieved in both of these respects.

In 1837, when Southmayd, as a boy, began his studies, and even in 1841, when he bore the well-earned title of the Chancellor, there were no such floods of books as those in which the law itself is now thoroughly drowned; there were but few New York reports and still fewer American text-books; and it was quite practicable for a vigorous young mind to master all the leading cases that had

been decided here, and that is exactly what Southmayd did.

Our efficient Librarian, Mr. Poole, has, at my request, been so kind as to prepare a list of the printed reports of cases decided in the State of New York up to 1840, by which it appears that instead of the thousands of volumes in which the student at law now has to lose himself, there were, up to 1840, only about eighty volumes of published reports in the State of New York, exclusive of Criminal and Practice Reports, and thirty-nine volumes of the Supreme Court of the United States, so that it was not a difficult matter for even a young student in those days to make himself master of all the important cases that would naturally be cited, and of the principles thereby established. In connection with his studious reading and work in the office, he was a frequent

attendant upon the courts, and made himself a finished lawyer. I have no doubt that Coke upon Littleton and Blackstone had come in for a share of his attention; and we may be sure that he knew much of Kent's Commentaries by heart, the second edition being then available and being, as it were, a complete review of his studies up to date. Of equity he early became a master, for his mind was naturally adapted to its principles—so fair, so just, so altogether reasonable and undisturbed by the technicalities that were still found so embarrassing in the common law.

We may be sure that, in his clerkship and his subsequent partnership with Judge Johnson, he became a splendid practitioner and a thorough adept in the art of unraveling complicated facts and involved accounts, and in applying to them the settled principles of law. In

those days the Law and the courts dealt with fewer subjects than at present, and, in New York City, Trusts, Real Estate, and Commercial Law made up the bulk of the business, and before his name yet appeared in the books, he was engaged in two really great cases which are reported under the names of the leading counsel, but in which Southmayd had a very active hand.

Ogden vs. Astor, reported in 4 Sandford's Reports (N. Y. Superior Court), 311, was a very great case for those days, and involved many important and intricate commercial transactions, running through a long series of years. Although his name does not appear, there is good authority for saying that Mr. Southmayd for years was engaged in unraveling the complicated accounts between the parties. The case was commenced by bill filed in January, 1842, against John Jacob Astor

and William B. Astor as partners, in behalf of the administrator of Nicholas G. Ogden, whose transactions with the Astors began as far back as 1816. During that period it was claimed that Ogden also was a copartner, and all sorts of obnoxious charges were made in the bill of overcharges, errors, omissions, and wrongs, specified as having taken place in the accounts kept by the defendants. This partnership was denied, and the Astors also denied the allegations of fraud, suppression, and concealment, and explained such of the errors alleged as were not positively denied. They claimed also an account stated in 1826 as a complete bar to the suit, Ogden, the testator, having died before that date. The pleadings, together with the proofs and documentary evidence produced, the courts say, would fill more than two volumes of the size of these reports, or 1500 pages.

The claims made were very large, and upon a hearing before two judges of the Court, which occupied eleven days in the fall of 1850, a Referee was appointed to restate the accounts.

It does not appear by the printed reports of the case that Mr. Southmayd was in it up to that time, the original argument having been conducted by Charles O'Connor and George Wood for the complainant, and Daniel Lord and Benjamin F. Butler for the defendants. But after this time, Mr. Southmayd was called in by Mr. Daniel Lord for the Astors, and for years appears to have devoted vast attention to the matter, so that, as I am credibly informed, when it came up in 1855 for consideration before the full bench of the Superior Court, upon the coming in of the Referee's report, Mr. Southmayd had so thoroughly mastered all the intricacies and diffi-

culties of the case that he was entrusted with the responsible duty of opening the case for the defendants. This he did at great length, occupying something like a day and a half; but he made the whole matter so plain, both to his associate, Mr. Lord, and to the distinguished counsel upon the other side, clearing up all the mysteries involved in accounts of so many years, that the case proceeded no further, and the counsel for the plaintiff were satisfied to settle without further argument. The claim, which had been very large at the outset, was reduced to such reasonable dimensions in the settlement, that the Astors recognized the great service that had been done them, and being filled with admiration at the splendid manner in which he had presented their cause, always afterward were wont to resort to Mr. Southmayd for advice and legal service in any seri-

ous matter. Not only did John Jacob Astor frequently employ him, but William B. Astor relied upon him absolutely, and made him one of the executors of his will, and thus he secured a most valuable clientage.

Another great commercial case in which, while yet unknown to fame, he was deeply engaged with Judge Johnson, and of which I feel certain that he bore the brunt, was *Iddings vs. Bruen*, reported in 4 Sandford's Chancery Reports, 223. This also involved many intricate and complicated questions of fact and law, and occupied several years, being contested by Johnson and Southmayd on one side and by Butler and Evarts on the other. Not long after it was finished, Mr. Johnson was elected to the Court of Appeals, and this left Mr. Southmayd open to other engagements, an opportunity of which Butler and Evarts,



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having long observed, in the litigation which he had been conducting against them, his great power of labor, his learning, skill, and tenacity of purpose, quickly availed themselves by inviting him to join them on terms which were very soon made equal. Thus, in 1851, was formed the firm of Butler, Evarts & Southmayd, which, with various successions, has continued until this day.

It would not become me to speak of the history of that firm, but, as an indication of how the fortunes of lawyers have changed since its foundation, I may say that when Mr. Evarts invited me to join it in 1859, he wrote me that I might fairly expect that the net income of the firm, exclusive of his own outside counsel fees, would amount to twenty thousand dollars. But I must say that during the whole period of his connection with it, until he retired at the age of

sixty in 1884, Mr. Southmayd was the mainstay of the whole concern. If there was a knotty point of law or practice to be decided, a difficult will, trust or contract to be drawn, an important opinion to be prepared, it was almost always left to him, and he always succeeded—he would never give in till the problem was solved; and as he was known to be always at his desk, clients at all hours flocked about him for advice, which is, I think, the most responsible and difficult part of our whole professional work. And then, too, in consultation he was invaluable. You can imagine what a resource it was to Mr. Evarts or to myself, coming down from Court at the close of a protracted and exciting day, to talk over with him puzzling and unexpected questions that had arisen and get the benefit of his cool and quiet judgment.

He hated to go to Court himself, and

only went very rarely on great cases which had arisen out of important opinions given by himself, which it was vital to the interests of his clients, who had acted upon them, to sustain. I remember three such cases, the *Delaware & Hudson Canal Co. vs. The Pennsylvania Coal Company*, reported in 50 N. Y., 250, *The Tennessee Bond case*, reported in 114 U. S. Rep., 663, and the case of *Langdon vs. The City of New York*, reported in 93 N. Y. Ct. of Appeals, 129, in each of which eminent counsel had given an opinion contrary to his own, and they fought it out tooth and nail from start to finish, and in each case Mr. Southmayd was successful all along the line.

The case of *Langdon vs. The City of New York* was one of great public importance. There the City had duly laid out the water line of West Street on the

North River. But when the owners abutting on that water line and relying upon it, had acquired very valuable property interests, the City claimed the right, after many years had elapsed, to lay out a further line, several hundred feet outside of the former, over land under water, without making compensation to the owners affected by the change. This would have made their property no longer abutting on the river, with all the natural rights incident thereto, but high and dry interior lots.

This case was argued by Mr. Southmayd with very great earnestness and success, fully establishing the rights of his client, who, again, happened to be one of the daughters of John Jacob Astor;—but Mr. Carter, who was opposed to him and represented the City, was so positively convinced of the validity of its claim in the premises, that even after the

decision by the Court of Appeals, he is said still to have advised the City to proceed as against other owners, to reassert their original claim upon the ground, which was a favorite one with him, that nothing is decided until it is decided right.

In truth, Mr. Southmayd had a perfect genius for the law, and there was no department of it to which he was not fully equal, except only the trial by jury, for which I think he cherished a secret distrust. At any rate, he never cultivated any of the forensic arts which come in play in jury trials and never could have got an impossible verdict.

I remember Mr. Evarts one day, in the early days of my connection with them, coming into my room and throwing down upon my table a bundle of papers, and saying: "Choate, you must try that case." Well, it was a suit upon a Life Insurance Policy, containing that

wicked clause that if the insured should die by his own act or hand, sane or insane, the company should not be liable. He and Southmayd both said that it was impossible to get a verdict in the case, because the insured was found dead with a pistol in his right hand, with one barrel discharged and a hole in the roof of his mouth and the bullet in his brain.

Well, as in duty bound, obedient to the orders of my seniors, I went to Brooklyn and tried the case before a jury, Judge Gilbert, who was as humane as he was human, presiding. I never for a moment forgot the poor widow and orphans, to whom that \$12,000 perhaps meant life or death. I tried it on the not impossible theory that the deceased may have been blowing in the pistol to see whether it was loaded and it went off accidentally without any act or hand of his. The Judge, who was full of the milk of human

kindness, accepted the theory as a plausible one, and upon it submitted the case to the jury, who found a verdict for the plaintiff for the full amount claimed. Of course, I returned to the office triumphant, but Evarts and Southmayd both refused to believe, and said: "The General Term will lay you out." So, in due course, I argued the case at the General Term, and soon the decision came down—"Judgment affirmed with costs," and again they jeered. But, by and by, the Court of Appeals reversed, saying that the finding of the jury was an incredible one. Was not this a clear case of the usurpation by the Court of Appeals of the function of a jury, whose sole function it is to determine questions of fact? Southmayd smiled again, and my only consolation was that, in obedience to orders, I had done what I could.

So, many years afterward, in the case

of *Laidlaw vs. Sage*, I got no help from Mr. Southmayd, who had then retired, but was still always with us; the same Court again, as it always seemed to me, came startlingly near usurping the function of the jury. Two juries had successively decided upon positive evidence, contradicted only by the defendant, that on sight of the dynamiter about to drop his bag, Sage had moved the plaintiff from a position of less danger into the direct path of the explosion, so as to be a shield to his own person. The Court of Appeals, however, as I cannot help thinking, retried the question of fact, and in spite of the concurrent verdicts of two juries, in whom rested the only legal power to decide it, they reversed the hard-earned judgment, on the ground that it was impossible, in the case of such an explosion, to decide that the place to which the plaintiff was moved was more dangerous

than his original position. At least nine judges of the General Term had sustained the verdicts for the plaintiff, and were finally overruled by five judges only of the Court of Appeals. Was this within the constitutional power of that Court?

I do not believe that Mr. Southmayd ever undertook the trial of a jury case, where he would have been indeed a fish out of water. But in all legal questions he was supreme, and no lawyer in this city ever enjoyed more absolutely the confidence of his clients. As the business grew and great questions, interstate and international, arose, his professional reputation rose higher and higher, until, as I have heard, the bankers of Holland would not take an issue of bonds under a railroad mortgage unless Southmayd said it was all right, and the great lawyers of the city sought his opinion upon questions that arose in their own practice.

With many eccentricities, as will presently appear, he had an absolutely honest and straight mind, and with unerring instinct went right to the root of the matter submitted, stripped off everything that was superfluous and irrelevant and decided it upon some impregnable proposition of law.

As a draftsman in his best days he was, I think, without an equal. He seemed to be able to provide for every possible contingency, so keen and acute, and, at the same time, so far reaching was his mental vision. But in his later years this habit grew upon him to an almost disabling extent. So that sometimes you had to follow him through sentences whole pages long in his effort to provide for contingencies that would probably never happen.

In addition to great learning and inexhaustible power of labor, untiring patience and common sense, he had the

great and unspeakable gift of character, which is more than all the rest combined in the formation of a great lawyer, stooping to nothing, tolerating nothing small or mean or low, maintaining always the highest standard of personal and professional conduct, and putting everything to the test of his own good and clear conscience.

It was in recognition of his eminent position at the Bar and great learning that Yale University, in 1884, conferred upon him the degree of LL.D., which he most highly appreciated.

He uniformly refused, for himself and for the firm, to take any pecuniary interest in any matter that was entrusted to his or their professional charge, believing that it tended to professional degeneration, and that clients could only be properly served by lawyers who had no personal interest in the matter involved

to advance or protect. Of contingent fees in any form he had a special horror, and regarded the change of statute which made them possible as a serious damage to the profession, and the judicial iniquities, the exposure of which led to the formation of this Association, made him one of the most enthusiastic and zealous of its original members. This Bar Association, in fact, has never had or lost a member who reflected upon it greater honor. If Mr. Evarts were alive to-day, I am sure that he would join with me in declaring that much of our professional success and reputation was due to his support, his assistance, his inspiration.

For myself, I can give no better illustration of this than in the celebrated Income Tax case, in which was accomplished what was at the time regarded, at home and abroad, as the almost impossible achievement of overthrowing, in the Su-

preme Court, the entire scheme of an Income Tax embodied in an act of Congress. I might almost say with entire truth that it was Southmayd, who never went near the Court, who won the case. He was then seventy years old; he had retired from practice ten years before, and all that time he had refrained from any legal labor. In fact, as he claimed, he had ceased to be an attorney at law, and when he had occasion to put his name to a brief, he always signed "Charles F. Southmayd in person."

What he regarded as the iniquity of the Income Tax aroused all his old-time energy. By this time he had an ample income of his own which was affected, and he had a strong idea of the right of property being at the foundation of civilized government. Other men have five senses, but he had a sixth—the sense of property—very keen and very powerful; and he

also had an abiding allegiance to the Constitution under which the country had so long prospered, and an abhorrence of any violation of it. So, when he heard that I was to be in the case, he volunteered to prepare a brief, which proved, when completed, to be the keystone of the whole argument, and, indeed, of the decision which overthrew the Act of Congress. The Constitution had provided that direct taxes should be apportioned among the states according to their respective numbers, but this Act had levied all taxes upon income, from whatever source derived, indiscriminately upon all alike, without such apportionment.

To his clear mind, whatever else might be disputed, a tax on land was certainly a direct tax within the meaning of the Constitution, and a tax upon the income of land could by no possibility be distinguished from a tax on the land itself,

for it was a tax on the land from which the rent was derived, and was therefore necessarily a direct tax; a tax upon the income of accumulated personal property could not be distinguished in principle from the tax on rents;—and these all being found to be direct taxes, and therefore unconstitutionally levied, the Court in annulling them must find that Congress without them would not have enacted the rest of the tax, and therefore must declare the whole Act void.

This was the whole argument in a nutshell, and it all rested upon his first proposition, which was absolutely unanswerable then and is unanswerable now, and can never be answered, except by an amendment of the Constitution, which I, for one, hope will never be carried through, because it will throw almost the whole burden of every Federal Income Tax upon a very few of the larger States.

However that may be, it was his masterful brief that drove the entering wedge which by its cleavage demolished the Act, while the rest of us who appeared in Court, and argued the cause to its final conclusions, on the foundation which he had laid, won an undue share of the glory. I have heard from the Clerk's office that all the judges called for extra copies of his brief, but for none of the others.

Mr. Southmayd retired from practice at sixty, being afraid, as he told me long afterward, that if he continued, he might make some mistake, which I really believe that up to that time he had not done—at any rate he had made none that anybody else had found out.

His professional life from beginning to end had been a signal success, and had brought him ample rewards. But necessarily, from the way in which it was begun and continued, it had cut him

off from everything else. Beginning the study of it at twelve, and never relaxing the earnest pursuit of it, he lost his youth altogether, an irreparable loss to any man in any walk of life. Outside of the law, he had almost no interests—none of those bright gleams and dreams and illusions of boyhood which, for most of us, sparkle at the threshold, and brighten all the rest of our lives, lighten our burdens and help us to forget our woes—none of those joyful reminiscences and early friendships that light us on our way. Withdrawn from social life, he had but few friends, but with them he was always so genial and gentle that it was ever a thousand pities that he had n't a hundred times as many. Shut into the deep and narrow canyon of professional study and labor, he hardly knew what was going on outside of it, and had no other interest, no hobby, no possibility or capacity

for sport. But he did enjoy his work, and I am not sure that the keenest professional sportsman ever gets half as much pleasure and satisfaction as he did out of that.

Mr. Southmayd was never married, and led a truly solitary life. Doubtless in his earlier years he must have had some romantic sensations and experiences and perhaps disappointments. But, as the rolling stream of Time bore him along, as the walls of his narrow life began to close in upon him, and his natural love of accumulation grew, he seemed more and more to regard women as painfully expensive luxuries which might as well be dispensed with. "Your women folks will be the ruin of you yet," he used to say to me in a half-joking, half-serious way. Of course there was nothing personal intended. It was merely a concrete expression of his general and ab-

stract dread of cost. But I was bound to defend my own fireside, and always answered him in kind in some way, which pleased him mightily.

His later life was full of apprehensions. When a man retires at sixty from very active practice, with no native resources to fall back upon, no hobby to ride, no studies to pursue, his thoughts necessarily turn in upon himself and prey upon his inner consciousness, and so it was with him. No sooner was one apprehension dispelled, than others equally groundless came in various and shifting forms—apprehensions for his health and life, for his property and, at last, even for his personal liberty. The ever-growing list of misdemeanors, created by statute, disturbed him, and he even employed counsel to watch for such statutes introduced into the Legislature—man-traps, as he called them—lest he

might, without knowing it, commit offenses which might involve the penalty of imprisonment.

Thus, as his professional life began too early, so it ended too early and too abruptly, and he lost the great satisfaction of continuing to the end his usefulness to society which had once been so great.

Of course he was always a *laudator temporis acti*. Never changing himself (and I hardly observed any change in his appearance, his dress, his manners, or mode of conversation from the time I first knew him in 1855), he hardly realized that the world was changing all the time as it rushed by him. The judges of to-day he compared with Chancellor Kent, and Chief Justice Marshall with Justice Nelson and Judge Oakley, and the lawyers of to-day with Daniel Lord, George Wood, Charles O'Connor and William Curtis Noyes. He could n't at

all keep pace with the hustle and bustle of modern New York, or with the rapidly changing customs and habits of the profession.

He was really the most conservative man I ever knew, and, of course, prejudices grew upon him as years rolled on. Modern improvements had no charms for him, but his aversion to new methods was always mingled with much pleasantry, which indicated a consciousness in himself of falling behind the age. Perhaps no better illustration of this was presented than in his attitude toward new modes of locomotion and travel as they came pressing fast upon each other. His pet aversion was the elevated railroad, and it was his favorite boast to his dying day that he had never traveled upon it. When it was first constructed, he declared that he would never go upon it until the Court of Appeals should

decide that its owners were bound to pay damages to the abutting property owners. The failure to provide expressly for this in the original charter shocked that keen sense of property of which I have spoken. Well, it took long years of severe litigation to establish this liability, and in the meantime he had moved out of Ninth Street, where he had lived for a quarter of a century, giving the quaint reason for moving that death had visited every house but his in the block.

But at last the Court of Appeals decided, as he thought they ought, that such liability was necessarily implied in the act, though not expressed, and so compelled the company to pay many millions of dollars in damages to the abutting owners. Meanwhile he had traveled daily all the long journey of four miles from Forty-seventh Street to the office in the Sixth Avenue surface cars; and I said

to him: "Come, now, the Court has decided as you wanted them to; get on the Elevated Road with me and shorten your journey home by half an hour." "No," said he, "it's a fraud, anyway, and I never will ride on it," and he never did, but continued his slow transit by the Sixth Avenue surface cars. But at last this came to an end. For one cold November day, as he entered the car, seeing something unusual under the seat, he asked the conductor what it was, and being answered "a stove," he stopped the car and quit the line: "Never could ride with a stove in the car." He then took refuge in the Fourth Avenue car, which he liked much better: "Better cars, better air, better people." But this did n't last very long, for one day, standing on the corner awaiting a car, he saw one coming without any horses—an electric motor—and that he could not stand.

He never could tolerate motors—never once rode in an automobile—thought severe penalties ought to be visited upon their owners. And thus, at last, he was driven to take refuge in cabs, and here, too, his eccentricity was made manifest, for although he had an excellent pair of horses, coachman, and carriage of his own, he never would drive up and down in it. And when I asked him why not, he said because of the common law rule of “*respondeat superior*”: “If I hire a cab and an accident happens, I incur no liability. That falls upon the owner.”

His quaintness was always tinged with a sense of humor. Having laid the foundation of his own ample fortune in strict economy and unflagging industry, he used to say that every young lawyer ought to begin by laying aside all of his professional income, which he himself had been so situated as to be able pretty

nearly to do. "But," said I, "you surely don't really mean the whole of it. Would n't half do? The man must live." "Oh, that does n't follow," said he; "if he'll only follow my rule, he will soon be able to live upon the income of his income."

I think one could have almost told his calling as he walked the streets—a solicitor laden with many precious secrets. Matthew Arnold, who made his acquaintance the summer that he spent in Stockbridge, was perfectly delighted with him, and greatly enjoyed his company, saying that he reminded him for all the world of an old-fashioned English solicitor dug out of Dickens or Trollope or Thackeray, and he certainly was all that, with a vast deal of skill and learning besides. In the quiet confidence of the office, he was quite a match for Evarts in quickness and repartee, and it was a rare treat for the

youngsters, in the occasional intervals when there was nothing more serious to do, to hear them chaffing each other in very merry trim.

When the statute was passed in March, 1898, requiring attorneys and counselors-at-law in the courts of New York to file an affidavit not only that they had been duly and regularly licensed and admitted to practice as attorneys and counselors-at-law, but that they had taken the constitutional oath of office, which was to be a prerequisite of their being permitted to practice thereafter, and making it a misdemeanor to hold one's self out as an attorney at law without having taken and filed the constitutional oath required, Mr. Southmayd was put in a curious quandary, because there was no jurat affixed to the Roll which he had signed on being admitted to practice as an attorney, and he could not distinctly recollect hav-

ing taken such oath. And so, in an elaborate affidavit of many pages, he made and filed an unanswerable argument to show that he must have taken such oath at the time of his admission.

By this it appears that he was licensed and admitted to practice at the June Term of the Supreme Court held at Albany in 1846, which was fifty-two years before the date of his affidavit. He has strong reason to believe and does confidently believe that he did thereupon subscribe and take the constitutional oath of office. He recollects signing the Roll of attorneys upon that occasion, and that the reason of its being so impressed upon him as to be now recollected is, as he believes, that he recollects the circumstance of having, after he signed, or when he was about to sign, the Roll, looked back upon it and observed the signatures of certain persons who had subsequently

become prominent members of the Bar.

He recollects having attended in Court with the other persons who were examined for admission with him, and that the Chief Justice addressed to the young gentlemen who then were, or were about to be, admitted, some words of courtesy to wish them success in their profession, or to some such general effect, and, under the circumstances, he believes and feels quite confident that the candidates for admission thus attended with the view and for the purpose of taking the oath in open court as legally requisite, and perhaps for having their licenses delivered to them, and that he, as did others, did then take such oath in open court in conformity with the form of oath subscribed on the Roll.

The fact that no jurat is attached to the Roll or subscribed oath he feels and believes to be accounted for by the cir-

cumstance that the oath was required to be taken not before the Clerk, but in open court, as a witness would be sworn, and therefore he deposes and says that he has no practical, reasonable, and substantial doubt that he must have subscribed and taken and did subscribe and take, upon his said admission, as an attorney of the Supreme Court, the constitutional oath, although he feels bound to state that he does not, after the lapse of more than fifty years, recollect as mere facts and state as occurrences within his memory, either his subscribing or taking such oath, and could not now state the same upon oath, even to the extent that he has hereinbefore so stated, were it not for the reliance upon the information now obtained from the Clerk and the Clerk's office and the other circumstances above referred to; and the further circumstance that he does not think that his license as said attorney

would have been given out to him without his having subscribed and taken the oath required.

He further deposes that he cannot take the oath required by the Act of 1898, stating in fact his admission to have been as an attorney and counselor-at-law in the courts of record of this State, for the reason that his admission aforesaid was merely as an attorney of the Supreme Court, and that as the law stood at the time of his said admission as an attorney of the Supreme Court, the practitioners in the Court of Chancery, called solicitors, were to be appointed and licensed in the Court of Chancery, and that solicitors and counselors licensed in the Court of Chancery were to be authorized to practice as such in all the courts of equity.

He further deposes that accordingly, in the same month in which he was admitted as an attorney of the Supreme

Court, he was also admitted as a solicitor in Chancery, and received his license from Chancellor Walworth under the seal of the Chancery Court. He is very careful to insert, in his affidavit, a certified copy of the order in Chancery for his admission as such solicitor, but takes care to correct the same by stating that although the caption of the order was at Albany, his real appearance before the Chancellor for the purpose of being admitted was at Saratoga Springs, to which place he recollects going from Albany for that purpose, and that it must have been at Saratoga Springs that the Chancellor admitted him and signed the license and administered the oath as in open court, though it was not at any regular stated term. He thinks that it was then regarded as a fixed rule or principle that the Court of Chancery was open before the Chancellor as its sole

Judge whenever he so pleased, and he supposes that the Register drew up and entered the order under some sufficient indication or direction from the Chancellor; but still it may be that he is mistaken in relation to his recollections or impressions as aforesaid in relation to points of practice in the Court of Chancery, which was abolished more than fifty years before the making of his affidavit. He further feels justified in saying in his affidavit, as he now does, that he subscribed and took the constitutional oath of office as solicitor in Chancery, although at this time, so long subsequent, he cannot recollect as mere facts and could not state on oath as an occurrence or occurrences within his memory, either his subscribing or taking the said oath. He thinks that the Register as Clerk of the Court would not have given, and is quite confident that he would not have

received, such a certificate as is indorsed upon the license, if it had been untrue; and that he went from Albany to Saratoga Springs for the purpose of attending before the Chancellor there and doing what was necessary to obtain his admission as solicitor, and entitle him to practice thereunder, and he does not doubt that he knew what was so necessary and acted accordingly; and upon the premises aforesaid he deposes and says that he was admitted as aforesaid to the best of his knowledge and belief, duly and regularly so admitted, as a solicitor of the Court of Chancery; but that although he has spent very much time in searching for and endeavoring to find his license as attorney of the Supreme Court, he has not been able to find it, although very desirous to do so. He completes his argument by affidavit by stating that under and by virtue of the Act of May

12, 1847, commonly called the Judiciary Act, which provided that every person who should be a solicitor in Chancery or attorney in the Supreme Court of this State, on the first Monday of July then next, should be entitled to practice as attorney, solicitor, and counselor in all the courts of this State; wherefore he assumes that he acquired the right so to practice.

This affidavit is a striking illustration of Mr. Southmayd's extreme conscientiousness and unwillingness to state, especially under oath, any fact which was not to his own knowledge exactly so, and this characteristic conscientiousness in fact marked his whole conduct in life, and sometimes put him to great inconvenience.

His will, made in August, 1899, is not only holographic, but almost autobiographic in its fullness and particularity.

Written in his own hand on fifty-seven pages of foolscap paper, it sets forth with extreme particularity many incidents of his life, and recalls and provides handsomely for the children of his deceased partners; remembers even his remote relatives, such as daughters of deceased cousins, second cousins, as he rates it, and second or third cousins or otherwise, as the proper rating may properly be, and leaves considerable legacies to the New York Law Institute and to the Association of the Bar of the City of New York.

“Take him for all in all, we ne’er shall look upon his like again”—a great lawyer—an absolutely unique character—an honor to our profession for sixty years. I owe him more than I can tell, and am glad to transmit to those who did not know him, this quite imperfect picture of the man.

It is a grateful thing, indeed, for one who has joined "the innumerable caravan that journeys toward the silent halls of death" to catch far in advance a bright and last glimpse of a once renowned leader, and to leave a clear impression of his character, to those who are marching behind in the same procession.